

# Indiana Department of Education

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## QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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## EDUCATIONAL RECORDS: CIVIL RIGHTS AND PRIVACY RIGHTS

It has been a busy year for access issues involving the educational records of students in publicly funded schools. Federal legislation and court cases, including two important U.S. Supreme Court decisions, are refining understandings, resolving misunderstandings, or creating new concerns. The disputes are running the gamut from alleged civil rights violations, anti-terrorism initiatives, the nature of disciplinary records, and the often awkward relationship between public schools on the one hand, and local law enforcement officials and the juvenile justice system on the other.

### *FERPA and Civil Rights*

The more important Supreme Court determination was Gonzaga University v. Doe, 122 S. Ct. 2268 (2002), a 7-2 decision. The question posed was whether a student may sue for damages under federal civil rights laws to enforce provisions of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, as implemented through 34 CFR Part 99. The majority found that FERPA created no personal rights to enforce under 42 U.S.C. § 1983.<sup>1</sup>

John Doe was an undergraduate student at Gonzaga University, a private university in Washington. He intended to teach after graduating from the university. Washington, at the time, required all new teachers to obtain an affidavit of good moral character from the dean of the college or university from which they graduated. A teacher certification specialist at the university overheard a conversation alleging that Doe engaged in sexual misconduct with another student. The teacher certification specialist investigated and later informed the Washington teacher certification agency of the allegations, mentioning Doe by his actual name. Doe was never informed of the investigation nor was he aware that information had been disclosed regarding him. In March of 1994, he learned that he would not receive the affidavit required for certification. He also learned of the disclosures to the state agency by Gonzaga's teacher certification specialist. He sued under both state and federal law. A jury initially awarded him \$1,155,000, which included \$150,000 in compensatory damages and \$300,000 in punitive damages on the FERPA claim. On appeal, the Washington Court of Appeals reversed the FERPA damages, finding that FERPA does not create individual rights and, as a result, cannot be enforced under §1983. The Washington Supreme Court reversed the appellate court, reinstating the FERPA damages. Although the Washington Supreme Court acknowledged that "FERPA itself does not give rise to a private cause of action," it reasoned that FERPA's nondisclosure provision "gives rise to a federal right enforceable under section 1983." 122 S. Ct. at 2272. The U.S. Supreme Court reversed the Washington Supreme Court.

The U.S. Supreme Court acknowledged that there is a division of opinion among the lower courts on this question, and that the lower courts were often relying upon past Supreme Court decisions in other cases, suggesting "that our opinions in this area may not be models of clarity." *Id.*

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<sup>1</sup>42 U.S.C. §1983 is a mechanism for enforcing individual rights secured elsewhere in the U.S. Constitution or in federal law. Section 1983 does not provide any substantive rights itself.

Congress enacted FERPA under its spending power, conditioning receipt of federal funds on complying with certain requirements relating to access to and disclosure of personally identifiable information from a student's educational record. 122 S. Ct. at 2272-73. FERPA requires the U.S. Secretary of Education to enforce the Act. This enforcement includes the termination of funds where the educational institution fails to voluntarily come into compliance.<sup>2</sup> Doe argued that FERPA conferred upon any student enrolled in an affected institution a federal right not to have educational records disclosed to unauthorized persons without consent, and that this federal right is enforceable in suits for damages under §1983. "But we have never before held," the court wrote at 2273, "and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."

Congress did not "speak with a clear voice" and did not manifest an "unambiguous" intent to confer individual rights. Mere federal funding does not create a basis for private enforcement under §1983. *Id.* Redress of grievances through §1983 requires a plaintiff to "assert the violation of a federal *right*, not merely a violation of federal *law*." 122 S. Ct. at 2274, quoting Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353 (1997), *emphases original*.

We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section.

122 S. Ct. at 2275. In any judicial inquiry, there must be a determination "whether Congress *intended to create a federal right*." *Id.* (Emphasis original.) Whether Congress intended to create a private right of action is answered in the negative "where a statute by its terms grants no private rights to any identifiable class." *Id.*, citations omitted, *emphasis original*. "[T]here is no question that FERPA's nondisclosure provisions fail to confer enforceable rights. To begin with, the provisions entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." 122 S. Ct. at 2277.

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<sup>2</sup>LeRoy S. Rooker, the Director of the Family Policy and Compliance Office (FPCO), which is responsible for the enforcement of FERPA (see footnote 9, *infra*), acknowledged recently in a presentation to the National Council of State Education Attorneys (NCOSEA) that FPCO has never been required to terminate funding for an educational institution's failure to achieve compliance with FERPA. During the same presentation, he questioned whether the disclosure by the Gonzaga teacher certification specialist actually was covered by FERPA in the first place. The information disclosed did not come from the student's educational record but was obtained by the teacher certification specialist through her overhearing of a conversation and her independent investigation. Whether this information was even covered by FERPA was not raised before the Supreme Court.

“FERPA’s nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure.” 122 S. Ct. at 2278. The conclusion that Congress did not intend to confer any individual enforceable rights “is buttressed by the mechanism that Congress chose to provide for enforcing [FERPA] provisions,” by requiring the U.S. Secretary of Education investigate and adjudicate violations. *Id.* The Secretary established the Family Policy and Compliance Office (FPCO) pursuant to this Congressional requirement. *Id.* To permit private enforcement along with agency enforcement would create havoc.

It is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of “multiple interpretations” the Act explicitly sought to avoid.

122 S. Ct. at 2279. “[I]f Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA’s nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions. They therefore create no rights enforceable under §1983.” *Id.*<sup>3</sup>

The Supreme Court noted that Indiana had reached this same conclusion in an earlier state court decision in Meury v. Eagle-Union Community School, 714 N.E.2d 233 (Ind. App. 1999). See Gonzaga University v. Doe, 122 S. Ct. at 2272, *n.* 2. In Meury, the parents had written a note to the school, apparently regarding a disciplinary matter involving their son. This letter was included in the student’s educational record and forwarded—along with the records—to certain post-secondary institutions when the school was requested to do so. When it was discovered the parents’ letter had been included in the educational records, the parents sued under §1983 for alleged FERPA violations. The trial court granted the school district’s summary judgment motion, which the Court of Appeals affirmed. The appellate court stated that there were three reasons why the Muerys’ claim failed to present a viable federal claim: (1) “FERPA explicitly provides for a funding remedy with enforcement vested exclusively in the Secretary of Education”; (2) FERPA is designed to address educational institutions that have a “policy or practice” of denying access to educational records or releasing personally identifiable information without first securing written consent; and (3) “the letter did not disclose the substance of any private information, thus, dissemination of the letter to postsecondary educational and scholarship-granting institutions, based upon the Muerys’ request that

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<sup>3</sup>It should be noted that although the university prevailed on the FERPA claim, it did not prevail on the state law claims. Gonzaga University is reported to have paid over \$700,000 in damages, not counting attorney fees. The jury award, at the trial court proceedings, awarded Doe \$705,000 for defamation, breach of educational contract, negligence, and invasion of privacy. The jury awarded him \$150,000 for violation of his FERPA rights and punitive damages of \$300,000 for FERPA violation. Doe v. Gonzaga, 24 P.3d 390, 396 (Wash. 2001). Only the latter two damage awards were affected by the U.S. Supreme Court’s decision.

Eric's educational records be sent to the facilities, does not bring the Meurys' claim within the purview of FERPA and did not violate federal right to privacy tenets." 714 N.E.2d at 238-39.

The Meury court relied upon an earlier federal district court case that involved disability-related issues. See the discussion on the Individuals with Disabilities Education Act, *infra*. In Norris v. Greenwood Board of Education, 797 F.Supp. 1452, 1465 (S.D. Ind. 1992), the plaintiffs had also raised a FERPA claim that the student's privacy rights had been violated when the school district shared information regarding the student with other potential providers of services for the student. According to the Meury court, the Norris court "recognized that procedurally the plaintiffs had properly raised a § 1983 claim but that substantively FERPA is insufficient to support a § 1983 action for damages." Meury, 714 N.E.2d at 239.

The FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damage where the federal statute provides an exclusive administrative enforcement mechanism.

Meury, Id., quoting Norris, 797 F.Supp. at 1465.

### **Gonzaga University's Effect on Other Federal Laws**

The Individuals with Disabilities Education Act (IDEA), incorporates FERPA by reference through 20 U.S.C. § 1417(c). However, IDEA's regulations at 34 CFR §§ 300.560-300.577 expand upon FERPA's requirements. In a wide-ranging response to an inquiry from a member of Congress, the Office of Special Education and Rehabilitative Services (OSERS) noted the differences:

In addition to the FERPA provisions and IDEA-specific provisions that restate the FERPA requirements, the IDEA regulations also include some additional protections tailored to special confidentiality concerns for children with disabilities and their families. Public agencies must inform parents of children with disabilities when information is no longer needed and, except for certain permanent record information, that information must be destroyed at the request of the parents. 34 CFR § 300.573. If a state transfers the IDEA rights of parents to children at the age of majority [as Indiana does], the parents' rights under IDEA regarding educational records also transfer, but the public agency must provide any notice required under the due process procedures of the IDEA to both the student and the parent. 34 CFR §300.574. The state educational agency must give public notice about the collection of personally identifiable information in the state and a summary of the policies and procedures that public agencies must follow regarding storage, disclosure to third parties, retention and destruction of personally identifiable information. 34 CFR §300.561. Each public agency must have one official who is responsible for ensuring the confidentiality of any personally identifiable information, must train all persons who are collecting or using personally identifiable information regarding the state's policies regarding confidentiality and FERPA, and must maintain for public

inspection a current listing of the names and positions of individuals within the agency who have access to personally identifiable information. 34 CFR §300.572.

Letter to Schaffer, 34 IDELR ¶ 151. IDEA, unlike FERPA, provides procedural avenues for parents and students to enforce IDEA's provisions. One of these avenues is the complaint investigation process under 34 CFR §§ 300.660-300.662, which appears only in the regulatory provisions. Remedies are not restricted to the withholding of funds but can include the ordering of appropriate services and the awarding of monetary reimbursement. 34 CFR § 300.660(b).

Congress did intend to create a "right" when it wrote the IDEA. 20 U.S.C. § 1400(c). The right is to a "free appropriate public education" in the "least restrictive environment" that is indisputably an individual right. This right is protected through a series of procedural safeguards that include the right to administrative due process and judicial review of IDEA-related disputes. 20 U.S.C. § 1415. It is possible that a FERPA-type dispute that is also subject to IDEA procedural safeguards would not be affected by the constraints and dictates of the Gonzaga University decision.

However, Gonzaga University could affect another law that is somewhat similar to FERPA: The Protection of Pupil Rights Act (PPRA). The PPRA, which appears at 20 U.S.C. 1232h and is implemented through 34 CFR Part 98, is designed to protect students from impermissibly revealing certain information regarding the student or the student's family. Such matters include political affiliations; mental or psychological problems; sexual behavior or attitudes; illegal, anti-social, self-incriminating, or demeaning behavior; critical appraisals of other family members; legally recognized information or communications that are considered privileged; religious practices or affiliations; and income, except where this is necessary to determine a need for financial assistance. The PPRA is directed especially towards third-party surveys that are designed to elicit such information, requiring parental access to such surveys in advance of administration and requiring written consent before a student would participate.<sup>4</sup> The enforcement provisions for PPRA at 20 U.S.C. §1232h(e),(f) are virtually identical to the enforcement provisions for FERPA at 20 U.S.C. §1232g(f),(g). It would appear that the analysis applied to FERPA by the U.S. Supreme Court would apply as well to a dispute under the PPRA, resulting in a determination that the PPRA does not confer upon anyone an individual right that would be enforceable through a §1983 action.<sup>5</sup>

### ***Disciplinary Records***

A continuing controversy has centered around the nature of disciplinary records of students and whether such records are educational records. Most public schools treat disciplinary records as

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<sup>4</sup>Indiana has a state law based upon the PPRA. It can be found at I.C. 20-10.1-4-15. The PPRA has also been amended by the No Child Left Behind Act of 2001, see *infra*.

<sup>5</sup>Mr. Rooker, the Director of FPCO, is also responsible for the enforcement of PPRA. During the same NCOSEA presentation (see footnote 2, *supra*), he agreed that Gonzaga University would likely apply to any action initiated under the PPRA based upon the similar enforcement language created by Congress for both FERPA and PPRA.

educational records, although it is not uncommon to expunge minor disciplinary infractions from an educational record at the end of a school year. The possibility of expungement is widely perceived as an incentive. There may be future limitations on the exercise of such discretion by public schools.

The No Child Left Behind Act of 2001, Sec. 4155(b), creating 20 U.S.C. §7165, requires each State to provide an assurance by January 8, 2004, that it “has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.”<sup>6</sup> Under Sec. 4155(a), this provision does not apply to nonpublic schools or other private persons or entities. The assurance has to be “[i]n accordance with the Family Educational Rights and Privacy Act [FERPA] of 1974 (20 U.S.C. 1232g).” Sec. 4155(b).<sup>7</sup>

Congress indicated a similar sentiment when it reauthorized the Individuals with Disabilities Education Act in 1997. At 20 U.S.C. §1413(j), Congress addressed disciplinary information as follows:

The State may require that a local educational agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information is included in, and transmitted with, the student records of non-disabled children. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child’s records must include both the child’s current individualized education program and any such statement of current or previous disciplinary action that has been taken against the child.

*Cf.* 34 CFR § 300.576. Indiana does not presently require disciplinary records to be a part of an educational record. I.C. 20-8.1-3-17.5 provides that a “high school transcript” of a student include his attendance records, his latest ISTEP scores, any secondary level and post-secondary level certificates of achievement, and immunization information. Public schools are authorized to include additional information.

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<sup>6</sup>No Child Left Behind Act of 2001, Sec. 4155 **Transfer of School Disciplinary Records**.

<sup>7</sup>There is a similar NCLBA provision under Title IV–21st Century Schools at Sec.4115(b)(2)(E)(xvi), authorizing the use of funds under this subpart for “[e]stablishing or implementing a system for transferring suspension and expulsion records...by a local educational agency to any public or private elementary school or secondary school.” 20 U.S.C. §7115.

A long-running dispute over the status of disciplinary records in Ohio may be coming to an end. In United States v. Miami University, 294 F.3d 797 (6<sup>th</sup> Cir. 2002), the 6<sup>th</sup> Circuit Court of Appeals affirmed the federal district court's decision<sup>8</sup> finding, *inter alia*, that discipline records are "education records" within the contemplation of FERPA. This dispute began in 1995 when the university's student newspaper sought student disciplinary records in order to track crime trends on campus. Miami initially refused to provide the records, but eventually did make the records available, albeit in redacted form. The newspaper sought full disclosure of the records with any redaction limited to a student's name, his social security number, or the student identification number of any student accused or convicted of a crime.

A divided Ohio Supreme Court granted the newspaper's writ of mandamus, concluding that the disciplinary records were not "education records" within the context of FERPA. State ex rel. Miami Student v. Miami University, 680 N.E.2d 956 (Ohio 1997), *cert. den.*, Miami University v. The Miami Student, 522 U.S. 1022, 118 S.Ct. 616 (1997).

Following the Ohio Supreme Court's decision, another newspaper, *The Chronicle of Higher Education*, sought disciplinary records from both Miami University and The Ohio State University but with the names intact and minimal redaction. Miami contacted the U.S. Department of Education to notify it that Miami might not be able to comply with FERPA.<sup>9</sup> LeRoy S. Rooker, the long-time director of the Family Policy and Compliance Office (FPCO), advised Miami that FPCO believed the Ohio Supreme Court was incorrect in finding that disciplinary records were not "education records" under FERPA. FPCO advised Miami that FERPA prohibited the release of personally identifiable information contained in a student's disciplinary record under these circumstances. Both Miami and Ohio State informed FPCO that they intended to release the records without the consent of the affected students.

The U.S. Department of Education initiated legal action, seeking a declaratory judgment as to the issue of disciplinary records being covered by FERPA and for injunctive relief to halt the unauthorized disclosure of personally identifiable information from a student's educational record. The federal district court eventually granted the U.S. Department of Education's motion for summary judgment and permanently enjoined the universities from releasing the disciplinary information except as provided by FERPA. *The Chronicle*, as an intervening party, appealed to the 6<sup>th</sup> Circuit Court of Appeals.

The 6<sup>th</sup> Circuit was unsympathetic. FERPA, the court noted, was created by Congress under its "spending power" authority in the constitution. As a condition for receipt of federal educational funding, educational institutions are prohibited from having a "policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students

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<sup>8</sup>See U.S. v. Miami University, 91 F.Supp.2d 1132 (S.D. Ohio 2000).

<sup>9</sup>The Family Policy and Compliance Office (FPCO) within the U.S. Department of Education is charged with the investigation and resolution of disputes involving FERPA. See 34 CFR §§ 99.60-99.67.



without the written consent of [the students or] their parents[.]” 294 F.3d at 806, citing 20 U.S.C. §1232g(b)(1). In fact, the purpose underlying FERPA was “to protect [parents’ and students’] rights to privacy by limiting the transferability of their records without their consent.” *Id.*, citing Joint Statement of Congress, 120 *Cong. Rec.* 39858, 39862 (1974).

The court noted that the FERPA definition for “education records” is broadly defined as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 294 F.3d at 807, citing 20 U.S.C. § 1232g(a)(4)(A). See also 34 CFR § 99.3. “The FERPA unambiguously conditions the grant of federal education funds on the educational institutions’ obligation to respect the privacy of students and their parents.” 294 F.3d at 809.

*The Chronicle* made much out of the apparent lack of respect for the state court decision by the federal district court. However, the Ohio Supreme Court “never reached the issue of whether the FERPA ‘prohibited’ the release of education records, much less student disciplinary records as a subpart thereof. Instead, the Ohio Supreme Court misinterpreted a *federal* statute—erroneously concluding that student disciplinary records were not ‘education records’ as defined by the FERPA—and prematurely halted its inquiry based upon that erroneous conclusion.... Furthermore, whether the release of a particular record is prohibited by federal law necessarily implicates the interpretation of that federal law.” 294 F.3d at 810 (emphasis original). The federal district court was not interpreting Ohio’s “Public Records Act” but was interpreting FERPA. *Id.* “The issues before the district court were of federal genesis and required no application of state law.” At 811. The federal district court “was not bound by the Ohio Supreme Court’s interpretation of ‘education records’ under the FERPA.” Although federal courts must defer to a State court’s interpretation of its own law, “federal courts owe no deference to a state court’s interpretation of a federal statute.” *Id.*

Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student’s university. Notably, Congress made no content-based judgments with regard to its “education records” definition. We find nothing in the statute or its legislative history to the contrary, and the various state court and federal district court cases cited by *The Chronicle* do not sway our conclusion. In fact, a detailed study of the statute and its evolution by amendment reveals that Congress intends to include student disciplinary records within the meaning of “education records” as defined by the FERPA. This intention is evinced by a review of the express statutory exemptions from privacy and exceptions to the definition of “education records.”

294 F. 3d at 812.<sup>10</sup> “[T]he disciplinary records of a student posing a significant risk to the safety or well-being of that student, other students, or members of the school community may be disclosed to individuals having a ‘legitimate educational interest[] in the behavior of the student.’” At 813, citing §1232g(h)(2). “This provision,” the court added, recognizes that a student has a privacy interest in his or her disciplinary records, even if those records reflect that the student poses a significant safety risk. Congress concluded that, although such information may be included in the student’s education record, schools may disclose those disciplinary records to teachers and school officials.<sup>11</sup> Obviously this narrow exemption does not contemplate release of the student disciplinary records to the general public.” *Id.*<sup>12</sup>

The 6<sup>th</sup> Circuit also addressed an often sticky question: When do records that are otherwise not educational records become such? In this decision, the court noted that FERPA excludes from its definition of “education records” certain “law enforcement” records created by the law enforcement unit of an educational institution. 20 U.S.C. §1232g(a)(4)(B)(ii). FERPA does not protect law enforcement records or place restrictions on their disclosure. However, “[i]f a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a ... school official for use in a disciplinary proceeding, that copy is an ‘education record’ subject to FERPA if it is maintained by the...school official...” At 814, citing 60 *Federal Register* 3464, 3466. In addition, “education records” do not lose their protected status as educational records simply because they may be in the possession of a law enforcement unit. *Id.*, citing 34 CFR § 99.8(c)(2).

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<sup>10</sup>There are a number of instances where personally identifiable information from a student’s education record can be released to a third party without first obtaining consent from the parent or the student. See, for example, 34 CFR § 99.31(a). Some exemptions apply only to post-secondary institutions. See 20 U.S.C. § 1232g(b)(6), which specifically address disciplinary records and certain access rights of alleged crime victims and the public generally, with specific prohibitions on the extent such information may be disclosed without consent.

<sup>11</sup>But it doesn’t compel disclosure. See, e.g., *Skinner v. Vacaville Unified School District*, 43 Cal. Rptr.2d 384 (Cal. App. 1995), where the court refused to predicate negligence on the school’s failure to advise teachers of a student’s past disciplinary actions for fighting such that teachers could have prevented an altercation where the plaintiff had her jaw broken in two places by the student. There was an insufficient causal relationship between the student’s past disciplinary record and the plaintiff’s present injuries.

<sup>12</sup>FERPA does not prohibit the disclosure of personally identifiable information from a student’s educational record when the educational institution reports a crime committed by the student and the records are relevant to the action. See, for example, 34 CFR § 99.31(a)(9)(iii). In addition, when Congress reauthorized IDEA in 1997, it included a provision at 20 U.S.C. § 1415(k)(9) that required an educational agency reporting a crime committed by a child with a disability to “ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.” *Cf.* 34 CFR § 300.529.

The court also rejected *The Chronicle's* argument that the First Amendment compels access to student disciplinary records involving criminal activities and punishment. Disciplinary records, the court noted, are not the same as criminal proceedings, especially given the restricted due process rights. 294 F.3d at 821-22. Further, “[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” 294 F.3d at 820, quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85, 92 S. Ct. 2646 (1972).<sup>13</sup>

### ***Probation Officers***

As noted above, FERPA is incorporated by reference into IDEA, 20 U.S.C. §1417(c). Under the federal regulations for IDEA, there is a responsibility to conduct complaint investigations when any person alleges a public agency responsible for the education of children with disabilities has violated federal or state laws in this respect.<sup>14</sup>

In Complaint No. 1903.02, the complainant alleged, in part, that the public school district violated the confidentiality requirements of IDEA (see 34 CFR §§ 300.560-300.577) and Article 7 (see 511 IAC 7-23-1, restating IDEA) when the school district released personally identifiable information from the student’s educational record to a probation office without first obtaining written parental consent. The student, a 14-year-old student with a learning disability, had been involved in the local juvenile justice system. The student and his parent signed a probation agreement stipulating that the student “will be in attendance at school on a regular basis and will abide by the rules of the school.” The school district and the probation officer represented that the parent was advised at that time that the probation officer would obtain reports on a regular basis from the school regarding the student’s attendance, academic performance, and behavior to insure the student’s adherence to the terms of his probation agreement. However, neither the probation officer nor the school obtained written, dated consent of the parent, which is required in order to provide information from the student’s educational record to the probation officer. See 511 IAC 7-23-1(p), 34 CFR § 300.571. The school district relied upon a “Miscellaneous Court Order” dated June 8, 1994, which purported to authorize the exchange of information between the school and the court “on specific cases concerning delinquent children...”

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<sup>13</sup>On March 23, 2000, Mr. Rooker issued a public statement regarding the federal district court’s decision enjoining the universities from releasing the disciplinary information requested by *The Chronicle*. He explained that the U.S. Department of Education filed the suit “to prevent irreparable harm to students, including student victims, student witnesses, and students found not to have committed disciplinary violations, who legitimately expected privacy and confidentiality with respect to on-campus, disciplinary records.” He also noted that Congress, through the Higher Education Amendments of 1998, amended FERPA “to allow postsecondary institutions to disclose the final results of disciplinary proceedings in which an institution determines that the student is an alleged perpetrator of a crime of violence and that the student violated its rules or policies with respect to such an allegation.”

<sup>14</sup>See 34 CFR §§ 300.660-300.662. The corresponding Indiana regulation can be found at 511 IAC 7-30-2.

There is no state or federal authority for the issuance of such an Order. As a result, the school district was found to have violated special education law by disclosing to a third party personally identifiable information from the student's educational record without first obtaining the written, dated consent of the parent. This situation was not included within the exceptions to the requirement that written, dated consent be obtained prior to disclosure. See 511 IAC 7-23-1(q), 34 CFR § 99.31(a).<sup>15</sup> The same school district was found to have committed the same violation in Complaint No. 1914.02.

Shortly after the conclusion of the complaint investigations, the probation officer sought further written guidance from the Indiana Department of Education regarding the application of federal and state law to access to the educational records of students subject to the juvenile justice system. He also requested review of a proposed release form his office wished to employ. The probation officer also lamented that the Department's investigations would limit the ability of school districts to report crimes or to cooperate with local law enforcement authorities in insuring school safety.

In a response dated July 19, 2002, the General Counsel for the Indiana Department of Education provided the following response.

I received on July 3, 2002, your letter requesting clarification regarding the application of certain state and federal privacy laws to referrals by public schools of students considered truant. Your concerns stem a recent complaint investigation report issued through the Indiana Department of Education, Division of Exceptional Learners.

Complaint investigations are required where it is alleged that an Indiana public school district has violated state or federal laws regarding the provision of special education and related services. See 34 CFR §§300.660-300.662 of the Individuals with Disabilities Education Act (IDEA) and 511 IAC 7-30-2 of the Indiana State Board of Education's rules and regulations for special education ("Article 7"). The requirement of public agencies to ensure the confidentiality of personally identifiable information contained in a student's educational record is derived primarily from the Family Educational Rights and Privacy Law (FERPA), as implemented through 34 CFR Part 99. IDEA incorporates FERPA through 20 U.S.C. §1417(c). Article 7, in order to comply with IDEA, incorporates both IDEA and FERPA provisions. See 511 IAC 7-23 *et seq.* Complaint investigations are applications of state and federal law. The results of such investigations are applicable statewide. Your question, however, can be addressed primarily through FERPA and Indiana law.

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<sup>15</sup>The probation agreement was signed on December 20, 2001. Upon "Reconsideration," a type of appeal of the initial complaint investigation report, see 511 IAC 7-30-2(i), (j), an earlier "Consent to Background Investigation and Release" signed by the parent on April 17, 2001, was produced. The signed Release authorized the school to "release all records and information as to [the student]" to the juvenile probation department. Accordingly, the determination of non-compliance was revised to indicate the school was in compliance with Article 7 and IDEA.

The specific complaint investigation report (CIR) that has created concern for you is #1903.02, which addressed an issue as to whether the local public school district violated special education privacy provisions when it shared with the probation office personally identifiable information from a student's educational record without first securing written parental consent. The initial CIR indicated the school district was not in compliance. Subsequent to this determination, we were provided with a form entitled *Consent to Background Investigation and Release*, which was signed by the parent. This is apparently the same form you attached to your letter I received on July 3, 2002. Accordingly, a revised CIR #1903.02 was issued on June 21, 2002, indicating the school district was in compliance with the confidentiality requirement for educational records. At no time was there an issue, a finding, a conclusion, or a corrective action regarding the initiation of truancy proceedings.

A contemporaneous CIR, #1914.02, also involved the same school district as in #1903.02. The school did violate the aforementioned privacy laws by supplying personally identifiable information to the probation office without first securing written parental consent or satisfying the conditions where such information can be supplied without first securing such written consent. However, CIR #1914.02 concluded that the school district did not violate any law when it reported the possible commission of a crime to local law enforcement. The reporting of purported crimes is not prohibited by state or federal law; in fact, some laws compel schools to report such occurrences. See, for example, I.C. 20-8.1-5.1-10 (possession of firearms, bombs, or deadly weapons); I.C. 20-8.1-5.1-18(c) (referral by school to juvenile court for alleged physical assault); I.C. 20-8.1-12.5 *et seq.* (reports of threats or intimidation of school employees); I.C. 20-8.1-3-31.1 (report by school officials to juvenile courts of students who are habitually truant in violation of compulsory school attendance act); I.C. 20-8.1-3-17.2 and I.C. 9-24-2 *et seq.* (habitual truants, suspended or expelled students, students withdrawn from school and reporting to Bureau of Motor Vehicles); and I.C. 20-8.1-5.1-19 and I.C. 31-34-1-7 (failure of parent or guardian to participate in school disciplinary proceedings affecting child's welfare).

FERPA—and, by extension, IDEA and Article 7—contains provisions where prior parental consent is not required in advance of providing personally identifiable information to an agency such as a probation office. The more common situations would be where a subpoena is issued for such information or the court includes such a disclosure requirement in its dispositional order and communicates same to the affected public school district. See 34 CFR §99.31(a)(9). If the public school district initiates legal action against a parent or student, the public school district can disclose to the court—without a court order or subpoena—the educational records of the student that are considered relevant by the school district in the prosecution of this action. See §99.31(a)(9)(iii)(A). Likewise, if a parent or student initiates legal action against the public school district, the school district can disclose to the court educational records the school district believes is relevant to its defense against such

action, and can do so without first securing written consent, a court order, or a subpoena. §99.31(a)(9)(iii)(B). Public school districts can also disclose educational records where there is an immediate health or safety emergency involving the student. §§99.31(a)(10), 99.36.

The release form you attached to your letter obviously satisfied state and federal requirements as the original adverse finding in CIR #1903.02 was reversed when the release was presented for reconsideration. Had this been presented in the initial investigation, there would have been no adverse finding.

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### ***Law Enforcement***

As noted in the July 19, 2002, response, the school district did not violate special education law when it reported to local law enforcement the alleged commission of a crime by the student. Both Article 7, at 511 IAC 7-29-9, and IDEA, at 20 U.S.C. § 1415(k)(9), 34 CFR § 300.529, permit the reporting to law enforcement agencies of an alleged crime by a student with disabilities without first obtaining written, dated consent of the parent or guardian. A school district reporting an alleged crime “shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime,” but “only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.” *Id.* Indiana has had no case law construing this provision but has addressed it through Complaint No. 1332.98, where a school district was determined to be in compliance with special education requirements when it reported to law enforcement a 14-year-old middle school student who set fire to another student’s sweater using a road flare. The incident could be considered the commission of a crime. The school district provided information from the student’s educational record to law enforcement that the school district deemed necessary for law enforcement personnel to know about this student. Also see In the Interest of Trent N., 569 N.W.2d 719 (Wisc. App. 1997), upholding a school’s initiation of delinquency proceedings against the student for disorderly conduct as consistent with special education requirements.

An interesting case involving the commission of a crime on school grounds—but not involving a student with a disability—occurred recently in Massachusetts. In Commonwealth v. Buccella, 751 N.E.2d 373 (Mass 2001), the Massachusetts Supreme Judicial Court had to address whether a school district violated FERPA and state law when it turned over to law enforcement personnel examples of the student’s class work so that handwriting experts could examine the exemplars to determine whether the student was the author of racial slurs printed on a blackboard and directed at a teacher. The student had been disruptive in the teacher’s class in the past, including the making of racial slurs. He had been disciplined by the school for these behaviors and utterances. Over a weekend, someone broke into the teacher’s classroom and wrote racial slurs on the blackboard. Subsequent incidents of vandalism also occurred. Police took photographs of the handwriting and showed the photographs to faculty, but no one could positively identify the author of the handwriting. The student remained the principal suspect.

The vice principal provided to the police samples of the student's school work along with school work from two other students and requested that police analyze the handwriting. Both police experts and an independent expert confirmed that the student was the likely author of the graffiti. The student sought to have the handwriting exemplars suppressed because neither the student nor his parents consented to their release to law enforcement. The trial court granted the student's motion to suppress and the motion to dismiss; however, the Supreme Judicial Court reversed.

The court acknowledged that if it determined the exemplars from the student's homework, tests, and quizzes were educational records, then there would be a breach of confidentiality because the school did not obtain written parental consent nor did the police obtain a warrant or subpoenas for these items. 751 N.E.2d at 378. The court was not persuaded that the exemplars were actually part of an educational record, noting that "homework, tests, class assignments, and the like are not part" of an educational record because these are not "typically maintained in a central file on the student" but "are typically handed in to teachers, graded, and returned to the students. The papers themselves are only briefly in the school's possession; all that is 'kept' by the school is the resulting grade." 751 N.E.2d at 379.<sup>16</sup> If the homework and similar classroom work were considered educational records, "[o]ther standard teaching practices would be forbidden under the defendant's proposed interpretation... A teacher could not post a student's work on a bulletin board, or read a student's essay aloud in class, without the 'specific, informed written consent' of either an 'eligible student' or a parent." At 381. Teachers could not share a student's art work with a class without first obtaining parental consent. Displays of any work as a means of recognizing, rewarding, or encouraging student achievement could not occur without first obtaining parental consent. If the student's interpretation of what constitutes an "educational record" would include routine homework assignments, quizzes, and tests, teaching would become "absurdly cumbersome." *Id.*

Even though the court rejected the student's arguments that privacy requirements for educational records would apply to the exemplars turned over to the police by the vice principal, there may still be some privacy concerns unrelated to FERPA and its state counterpart. A student could reasonably expect, however, that any written work handed to a teacher would be used solely for educational purposes (review, correct, and grade the paper or test and return it to the student) and not turned over to an outside source, such as the media. At 382-83. "A mere expectation that the person to whom an item is entrusted will use it for limited purposes and not reveal it to others does not give rise to a reasonable expectation of privacy recognized under the Fourth Amendment to the United States Constitution." 751 N.E.2d at 383.

It would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes. Thus, a student may reasonably expect that papers handed in to public school teachers will be used solely for educational purposes and not

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<sup>16</sup>This case was decided before the U.S. Supreme Court's decision in Owasso Ind. Sch. Dist. v. Falvo, 534 U.S. 426, 122 S. Ct. 934 (2002).

disclosed outside the educational setting. While holding that school records are not literally privileged (as they may be obtained by means of a mere subpoena), we have nevertheless recognized that there are privacy interests at stake in school records and held that [state law] exempts such materials from public disclosure. [Citation omitted.] For purposes of this case, we shall thus assume that the defendant had a reasonable expectation of privacy with respect to his school papers, notwithstanding the fact that he had turned them over to his teachers.

Id. The court assumed that the school's release of the student's work to the police constituted a form of "search" under the Fourth Amendment. However, under New Jersey v. T.L.O., 469 U.S. 325, 333, 105 S.Ct. 733 (1985), a school's need to maintain order in the school is balanced with the student's legitimate expectations of privacy. "To that end, school officials are not required to obtain a search warrant prior to conducting a search in school." At 384. The Fourth Amendment does not require school officials to have probable cause prior to conducting a search. "Instead, school officials need only act reasonably in all the circumstances." Id. Whether a search by school officials is reasonable depends upon (1) whether the action was justified at its inception, and (2) whether the search actually conducted was reasonably related in scope to the circumstances that justified the interference in the first place. Id., citing to T.L.O. In short, school officials need only a reasonable suspicion—not absolute certainty—that an infraction of school rules or laws has occurred.

The search conducted here easily meets this standard of reasonableness. It was reasonable to suspect the defendant in connection with these crimes, and the inspection of papers he had turned in to school teachers was a minimal intrusion. Indeed, the only inspection being conducted was of the handwriting characteristics displayed on the papers, not their substantive content or academic merit. Given that there is no reasonable expectation of privacy with respect to handwriting itself, United States v. Mara, 410 U.S. 19, 21, 93 S. Ct. 774, 35 L.Ed.2d 99 (1973), the scope of the inspection was limited to a subject that was not even private, and any observations beyond the characteristics of the handwriting were purely incidental.

751 N.E.2d at 384-85. The court also recognized that the school itself was a victim of these particular crimes. Like any victim, it sought to assist the police in solving the crimes and preventing further incidents. "While the school may have had some general obligation to use student papers only for educational purposes," the court wrote at 385, "it had a clear obligation to prevent further racial harassment of a faculty member and further physical damage to the public school premises." The student's papers likely contained evidence pertinent to a continuing investigation of disruptive conduct at the school. "[I]t was reasonable of the school to review those papers and submit them for expert evaluation by the police. This search, if it was a search, easily passes muster under the Fourth Amendment requirement of reasonableness." Id.

In a separate opinion, the chief justice concurred that homework, quizzes, and similar classroom work are not considered a part of an educational record, but the chief justice disagreed that such student work is never considered as such. The FERPA definition for an "education record" is rather broad, citing to federal district court's decision in Miami University, discussed *supra*. "Many



student assignments and other student work papers contain personal information and personal expressions. It would plainly contravene the purpose of FERPA to permit an educational institution to disclose to third parties copies of a student's written assignments that have been 'maintained' in the student's administrative file." 751 N.E.2d at 388 (dissenting).

### ***Courts with Juvenile Jurisdiction***

In Complaint No. 1899.02, an 18-year-old student eligible for special education and related services allegedly sent threatening e-mails to fellow students. He was suspended from school, pending expulsion. Later, his case conference committee determined that his behaviors were a manifestation of his disability, which precluded expulsion proceedings.<sup>17</sup> The county sheriff's department provides personnel to the school to serve as a school resource officer (SRO). The SRO is a deputy sheriff. The school reported the incident to the SRO. The assistant principal also sent personally identifiable information regarding the student to the county circuit court.

Under FERPA at 34 CFR §99.31(a)(5), a public school can provide information to juvenile justice officials so long as a state has a law to that effect and the information is provided in advance of adjudication. Indiana does have such an enabling law. See I.C. 20-10.1-22.4-3. However, before such information is to be provided, the juvenile justice agency—in this case, the circuit court—must certify in writing that it will not disclose the personally identifiable information to a third party without first obtaining the written consent of the parent or guardian, or the student, if the student is 18 years of age and does not require a guardian. I.C. 20-10.1-22.4-3(b)(3).

The school did not violate 511 IAC 7-29-9 when it reported the alleged threats to the SRO as the SRO is considered local law enforcement. However, the school did violate 511 IAC 7-23-1, which incorporates IDEA's and FERPA's confidentiality and privacy requirements, when it provided personally identifiable information regarding the student to the circuit court without receiving a written certification from the circuit court that it would not disclose the information to any third party without first obtaining the requisite written consent.

### ***Anti-Terrorism Measures and FERPA***

On October 26, 2001, President George W. Bush signed into law the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," known better by its acronym "USA PATRIOT ACT OF 2001." This law affected FERPA by adding another instance where an affected educational institution—which would include all Indiana public schools—can release personally identifiable information from a student's educational

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<sup>17</sup>See 511 IAC 7-29-6 and 34 CFR §300.529. A "manifestation determination" is an evaluative process conducted by a case conference committee based on information known or generated regarding a student in light of some untoward activity that could subject the student to some sanction. However, if the behavior is a manifestation of the student's disability or placement, the anticipated sanction is not warranted, although the student's Individualized Education Program (IEP) may need to be revised or the students' educational placement changed.

record without first obtaining written consent of the parent, guardian, or student. Under the USA PATRIOT ACT of 2001, a public school district can disclose, without the consent or the knowledge of the student or parent, personally identifiable information from the student's education record to the U.S. Attorney General. This disclosure would be in response to an *Ex Parte* order. An *Ex Parte* order is an order issued by a court with jurisdiction that is issued without notice to an adverse party.

The Act also amends FERPA at 20 U.S.C. §1232g(b)(4) and 34 CFR § 99.32. A public school complying with an *Ex Parte* order is not required to record the disclosure of information, as normally would be required. A public school complying with such an order and acting in good faith "shall not be liable to any person for that production."

LeRoy S. Rooker, the Director of the Family Policy Compliance Office (FPCO), issued on April 12, 2002, a "Memorandum: Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities."<sup>18</sup> The "Memorandum" succinctly addresses the changes occasioned by the USA PATRIOT ACT of 2001, as well as the pre-existing functions of lawfully issued subpoenas and court orders, 34 CFR § 99.31(a)(9), and the release of information in response to a health or safety emergency, 34 CFR §§ 99.31(a)(10), 99.36. The FPCO also explained the relationship between FERPA and disclosures to the Immigration and Naturalization Service (INS).

The Immigration and Naturalization Service (INS) requires foreign students attending an educational institution under an F-1 visa to sign the Form I-20. The Form I-20 contains a consent provision allowing for the disclosure of information to INS. The consent provision states that, "I authorize the named school to release any information from my records which is needed by the INS pursuant to 8 C.F.R. 214.3(g) to determine my nonimmigrant status." This consent is sufficiently broad to permit an educational institution to release personally identifiable information of a student who has signed a Form I-20 to the INS for the purpose of allowing the INS to determine the student's nonimmigrant status. Students that have an M-1 or J-1 visa have signed similar consents and education records on these students may also be disclosed to the INS.

## **VIDEO REPLAY: POPULAR CULTURE AND SCHOOL VIOLENCE**

The **Quarterly Report** January-March: 2002 reported on the recent judicial decisions and trends involving a purported relationship between school violence and violent video games and movies. Some of the students who shot and killed classmates reportedly were consumers of such videos and movies. Federal district courts in Colorado and Kentucky rejected claims by the estates of deceased

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<sup>18</sup>The "Memorandum" is reprinted at 36 IDELR 268 (FPCO 2002).

students that the manufacturers and distributors were legally liable for the deaths.<sup>19</sup> See Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264 (D. Colo. 2002) and James v. Meow Media, Inc., 90 F.Supp.2d 798 (W.D. Ky. 2000). The 7<sup>th</sup> Circuit Court of Appeals found constitutionally suspect a city ordinance that attempted to restrict access by minors to violent video arcade games. American Amusement Machine Assoc. v. Kendrick, 244 F.3d 572 (7<sup>th</sup> Cir. 2001), *cert. den.*, 122 S. Ct. 462 (2001).

The legal theories and judicial analyses differ in each case, but emerging from these cases is a consensus that the violent actions of some students are not foreseeable consequences of playing video games and expressive, imaginative forms of entertainment—even if they have violent content—are entitled to First Amendment protection.

### ***The Sixth Circuit Weighs In***

The 7<sup>th</sup> Circuit in Kendrick was not addressing tort or products liability issues but strictly First Amendment concerns; the federal district court in James addressed tort and products liability issues but steadfastly declined to analyze video games under First Amendment principles. The 6<sup>th</sup> Circuit, in an opinion issued August 13, 2002, was not reticent to combine both the liability issues and the First Amendment scrutiny.

In James, et al. v. Meow Media, Inc., et al., 300 F.3d 683 (6<sup>th</sup> Cir. 2002), an appeal from the Kentucky federal district court, the 6<sup>th</sup> Circuit Court of Appeals not only affirmed the federal district court's decision against the plaintiffs but employed a Kendrick analysis as well. James involves the shooting deaths of three students in the lobby of Heath High School in Paducah, Kentucky, on December 1, 1997. The shooter was Michael Carneal, who was armed with a .22-caliber pistol and five shotguns. He was a 14-year-old freshman at the time. He was also an avid video game player and possessed a videotape of the movie "The Basketball Diaries," where the protagonist fantasizes about killing his high school teacher and several of his classmates. The plaintiffs sued the manufacturers and distributors of the video games and movies, claiming that they were negligent in that they knew or should have known that distribution of such materials to young people created an unreasonable risk of harm to others by making young people insensitive to violence and more likely to commit violent acts. The plaintiffs also asserted products liability claims.

The federal district court dismissed the claims, finding that Carneal's actions were not sufficiently foreseeable to impose a duty of reasonable care on the defendants. Even if such a duty existed, the court added, Carneal's actions constituted a "superseding cause" of the victim's injuries and not the "proximate cause" of the injuries necessary to impose liability on the defendant manufactures and distributors. The court also found no merit to the products liability claims and other claims asserted by the plaintiffs.

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<sup>19</sup>See "Video Games, Popular Culture, and School Violence," **Quarterly Report** January-March: 2002.

The 6<sup>th</sup> Circuit agreed, noting that the plaintiffs failed to establish that the defendants owed any duty of care to them, or that such a duty was breached, or that this breach was the proximate cause of the plaintiffs' damages. Carneal's actions were not foreseeable consequences from his playing video games, the same video games played by millions of others without such dire results.

It appears simply impossible to predict that these games, movie, and internet sites...would incite a young person to violence. Carneal's reaction to the games and movies at issue here, assuming that his violent actions were such a reaction, was simply too idiosyncratic to expect the defendants to have anticipated it. We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal's actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.

300 F.3d at 693. The court made a passing reference to the attempt to demonstrate a nexus between violent video games and movies and school violence:

Mental health experts could quite plausibly opine about the manner in which violent movies and video game affect viewer behavior. We need not stretch to imagine some mixture of impressionability and emotional instability that might unnaturally react with the violent content of the "Basketball Diaries" or "Doom." Of course, Carneal's reaction was not a normal reaction. Indeed, Carneal is not a normal person, but it is not utter craziness to predict that someone like Carneal is out there.

Id. The court also found that the defendants did not establish a "special relationship" with the plaintiffs such that a duty arose to protect them from Carneal's violence. For the sake of argument, the court observed that the video games may have given Carneal the "psychological tools" to commit the murders, but the defendants "had no idea Carneal even existed, much less the particular idiosyncracies of Carneal that made their products particularly dangerous in his hands." 300 F.3d at 695. The video games constitute "ideas and images" and are not actual tools used for a criminal act. "Beyond their intangibility, such ideas and images are at least one step removed from the implements that can be used in the criminal act itself. In the cases supporting this exception, the item that the defendant has given to the third-party criminal actors has been the direct instrument of harm." Id. "[W]e are loath to hold that ideas and images can constitute the tools for a criminal act..., or even to attach tort liability to the dissemination of ideas." Id.

This last statement served as a segue to a First Amendment analysis. The 6<sup>th</sup> Circuit noted that "attaching tort liability to protected speech can violate the First Amendment." Id., citing New York Times v. Sullivan, 376 U.S. 254, 265 (1964). In this case, the plaintiffs are not arguing that liability should attach to the inert aspects of the video games (the cassettes or cartridges) but to the ideas and images that are communicated by these products. As in Kendrick, the 6<sup>th</sup> Circuit recognized that protected speech need not be of an elevated sort but can be mere entertainment. "Expression, to be constitutionally protected, need not constitute the reasoned discussion of public affairs, but may also be for purposes of entertainment." Id. Although movies have been recognized as a form of

protected speech, “[t]he constitutional status of video games has been less litigated in federal courts. Yet most federal courts to consider the issue have found video games to be constitutionally protected.” 300 F.3d at 696, citing, *inter alia*, Kendrick and Sanders.

Applying First Amendment protection to video games does present some “thorny issues,” the court added, noting that there are some elements of video games that “are not terribly communicative.” In this case, however, the plaintiffs are attacking directly the communicative aspect of the video games, asserting that the video games “communicated to Carneal a disregard for human life and an endorsement of violence that persuaded him to commit three murders.” Id. Because the plaintiffs are attacking the communicative aspect of the video games, “we have little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit. Our decision here today should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which [the plaintiff] seeks to regulate them through tort liability.” Id.

The court acknowledged that the free expression rights are adaptable to certain target audiences. “[W]e have recognized certain speech, while fully protected when directed to adults, may be restricted when directed toward minors.” Id.

Of course, the measure here intended to protect minors from the improper influence of otherwise protected speech is quite different from the regulations that we have countenanced in the past. Those regulations were the product of the reasoned deliberation of democratically elected legislative bodies, or at least regulatory agencies exercising authority delegated by such bodies. It was legislative bodies that had demarcated what otherwise protected speech was inappropriate for children and that had outlined in advance the measures that speakers were required to take in order to protect children from the speech.

300 F.3d at 696-97. The court did not believe that tort liability should be permitted where there was protected speech, especially where there are no clear limitations in statute or regulation to evaluate conduct. “We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability.” 300 F.3d at 697. Such regulation of protected speech should not begin at the judicial level but should begin at the legislative and administrative levels.

As did the 7<sup>th</sup> Circuit, the 6<sup>th</sup> Circuit declined to equate violence with obscenity. Obscenity, the court wrote, is limited to material of a sexual nature that appeals only to prurient interests and lacks any socially redeeming value. Although obscene material is not protected speech, “[w]e decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material.” 300 F.3d at 698. Obscenity, as a concept, is considered “disgusting” or “degrading.” However, the plaintiffs in this case are arguing that the violent content of the video games (and the movie) are shaping behavior and causing consumers to commit violent acts. These claims are not obscenity based.

The court also rejected the plaintiffs' arguments that, if the content of video games is considered a form of speech, then it should be denied protection due to its incitement of others to violence. This argument fails, the court noted, because the speech is not *directed* to inciting or producing *imminent* lawless action and is not *likely to incite* or produce such action. There is no evidence the defendant manufacturers or distributors intended violent reactions by consumers of their products, nor were the reactions of a person such as Carneal posing an "imminent" threat to anyone. Rather, the plaintiffs asserted the erosion of Carneal was a gradual one. "This glacial process of personality development is far from the temporal imminence that we have required to satisfy the ...test [for incitement to violence]." *Id.* It was also "a long leap from the proposition that Carneal's actions were foreseeable" to the requirement "that the violent content was 'likely' to cause Carneal to behave this way." 300 F.3d at 699.

### ***Missouri Adopts A Minority Position***

In Interactive Digital Software Association, et al. v. St. Louis County, 200 F.Supp.2d 1126 (E.D. Mo. 2002), the federal district court reached a different conclusion from all the other federal courts. Interactive Digital, like the 7<sup>th</sup> Circuit's American Amusement Machine Assoc., involved a municipal ordinance designed to prevent access to "violent video games" to minors without parental consent. The 7<sup>th</sup> Circuit found unpersuasive two empirical studies conducted by psychologists that suggested a correlation between the playing of violent video games and increased aggressive attitudes and behaviors of children who play such games. The studies did not demonstrate that the playing of such video games actually incited such players to breaches of the peace. Such an immediate cause-and-effect would be necessary to justify content-based regulation. American Amusement, 244 F.3d at 574-577.

The St. Louis County Council, in the development of its regulation, conducted two public hearings. At one of the public hearings, a psychologist testified, referring to studies that purportedly found a connection between violent video games and psychological damage to children<sup>20</sup>. The psychologist also referred to writings of a Lt. Colonel Dave Grossman, who has suggested that violent video games are "killing simulators" and has stated that the United States military actually uses some video games to "train recruits to kill." 200 F.Supp.2d at 1137. The court described Lt. Col. Grossman as

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<sup>20</sup>The 7<sup>th</sup> Circuit found this same psychologist's studies to be unpersuasive in American Amusement. See 244 F.3d at 578.

a “psychologist and professor, who for more than twenty-five years researched the psychology of killing for the Army.”<sup>21</sup>

The eventual St. Louis County ordinance contained a preamble that correlated access to “graphic and lifelike” violence in video games to specific school shootings as well as other antisocial or disruptive behaviors that constitute a severe threat to the physical and emotional health of children. The ordinance required arcade operators to place harmful video games in a place separate from other video games that are not harmful and designate the area as restricted. The ordinance also made it unlawful to sell or rent a harmful video game to a minor unless the minor was accompanied by a parent or guardian. 200 F.Supp.2d at 1129-30. The court did view at least four video games that the St. Louis County Council considered harmful.

The video manufacturers challenged the ordinance on various grounds, but principally they contended the video games are “speech” within the meaning of the First Amendment and that the ordinance is a form of content-based restriction requiring strict scrutiny. The federal district court took a narrower view of what constitutes “speech” than did the 7<sup>th</sup> Circuit Court of Appeals. “In order to find speech, there must exist both an intent to convey a particularized message and a great likelihood that this message will be understood,” the court noted at 1132. Although the federal district court noted that the U.S. Supreme Court has determined that expression by means of motion pictures is included within the guaranty of First Amendment free speech, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952), the district court restricted this general finding to “the communication of ideas” and a mechanism to “inform” as well as entertain. Id. The court was reluctant to equate entertainment with information.

It appears to the Court if an entirely new “medium” is being given First Amendment protection, there does need to be at least some type of communication of ideas in that medium. It has to be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression.

At 1132-33. Relying upon earlier cases that determined video games were little different from pinball games, the district court determined that video games are “pure entertainment with no informational element,” and the fact that video games are more technologically advanced than a pinball game “does not impart First Amendment status to what is an otherwise unprotected game.” [Citations omitted.] At 1133. Oddly enough, the federal district court did not believe the 7<sup>th</sup> Circuit

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<sup>21</sup>*The Indianapolis Star*, a newspaper noted for its conservative editorial stances, wrote in support of the Missouri federal district court’s decision, describing Lt. Col. Grossman as a “voice crying in the wilderness. “We now have hundreds of sound, scientific studies that demonstrate the social impact of this brutalization in the media,” he is quoted as saying. “Violent Video Games May Yet Be Judged As Villains,” *The Indianapolis Star*, July 21, 2002. On August 4, 2002, the president of Interactive Digital Software, in a letter published in *The Star*, described Lt. Col. Grossman as a “self-proclaimed expert on media violence,” adding that his “theories are widely discredited by serious researchers, and the Army itself will tell you there is not a shred of truth to the claim that it uses video games to training soldiers to kill.”

addressed directly whether video games did constitute a form of “speech.” *Id.* It then referred to the findings of the federal district court decision the 7<sup>th</sup> Circuit reversed. That decision equivocated, finding that some video games are “speech” and others are not.

The Court has difficulty accepting that some video games do contain expression while others do not, and it finds that this is a dangerous path to follow. The First Amendment does not allow us to review books, magazines, motion pictures, or music and decide that some of them are speech and some of them are not. It appears to the Court that either a “medium” provides sufficient elements of communication and expressiveness to fall within the scope of the First Amendment, or it does not. The court in American Amusement only viewed action-adventure games, fighting games, and shooting games, and determined that even some of these might not fall within First Amendment protection. It can be assumed that the court would have similar reservations with puzzle games, sports games, and driving games.

At 1134.<sup>22</sup> The Missouri court found that “video games have more in common with board games and sports than they do with motion pictures.... The Court has trouble seeing how an ordinary game with no First Amendment protection can suddenly become expressive when technology is used to present it in ‘video’ form.” *Id.* The court also rejected any argument that “violence” creates “expression,” although no argument was apparently made. The court did acknowledge that some scripts provided to him indicate character and plot development, but the videos presented to him for review by the St. Louis County Council did not, in his estimate, contain such plot or character development. As a result, the manufacturers “failed to meet their burden of showing that video games are a protected form of speech under the First Amendment.” At 1135.

The Missouri federal district court did reject the municipalities argument that violent video games are a form of obscenity. Although “expression which is not obscene for adults may be obscene for children if the expression bears certain indicia of obscenity when examined from a minor’s point of view” [citation omitted], “obscenity encompasses only expression that depicts or describes sexual conduct, and materials that contain violence but not depictions or descriptions of sexual conduct cannot be obscene.” At 1136.

According to *The Chicago Tribune*,<sup>23</sup> the Missouri judge—Stephen Limbaugh—is the uncle of conservative talk-show host Rush Limbaugh. The case has been appealed to the 8<sup>th</sup> Circuit Court of Appeals, putting the effectiveness of the St. Louis ordinance on hold.

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<sup>22</sup>The Missouri federal district court is still referring to the Indiana federal district court decision that was reversed. The 7<sup>th</sup> Circuit, in its decision, addressed numerous genres of video games, including role-playing games (RPGs) and similar interactive video games that contain all the elements of literature. Even the fighting games, the 7<sup>th</sup> Circuit noted, are often derivative from movies.

<sup>23</sup>“Video Games Taking Center Stage,” *The Chicago Tribune*, October 7, 2002, reprinting an article by Mark Jurkowitz of *The Boston Globe*.



Intertwined with the argument about whether the games deserve 1<sup>st</sup> Amendment protection is the hot-button issue that has been debated for years in media, scientific and political circles. Does exposure to violent media imagery create a more violent society?

One weapon in the arsenal of those arguing for a correlation between video violence and aggression is a July 2000 joint statement from groups, including the American Academy of Pediatrics, the American Psychological Association, and the American Medical Association, concluding “that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.”

Id. On September 24, 2002, according to the *Tribune* article, a group of 33 media scholars, including Francis Couvares, Amherst College dean and professor, and Henry Jenkins, director of MIT’s Comparative Media Studies Program, filed a legal brief in the 8<sup>th</sup> Circuit on behalf of the industry plaintiffs, arguing that “censorship laws based on bogus claims that science has proved harm from violent entertainment deflect attention from the real causes of violence.”

### **DRESS CODES: FREE SPEECH AND STANDING**

Indiana authorizes public school districts to establish “appropriate dress codes” that are to be a part of the school district’s discipline rules. I.C. 20-8.1-5.1-7(a)(1). Prior to the 1995 legislation, the Indiana Court of Appeals, in Hines v. Caston School Corporation, 651 N.E.2d 330 (Ind. App. 1995) upheld the effect and application of local community standards in the development and implementation of a dress code that, *inter alia*, prohibited males from wearing earrings in school. The community considered earrings to be feminine attire. The appellate court found it reasonable for a locally elected school board to consider and reflect community values when developing discipline policies, which are themselves a “valid educational function to instill discipline and create a positive educational environment by means of a reasonable, consistently applied dress code.” 651 N.E.2d at 335. However, such dress codes must also be “within constitutional strictures.” Id. There was a brief discussion regarding student free speech issues that could arise within the context of one’s apparel, but personal preference—not free speech—was at issue in Hines.<sup>24</sup> The courts have recognized that dress codes can serve a legitimate governmental purpose, especially with regard to school security. Dress codes have been upheld where the public schools have been able to demonstrate actual problems exist associated with gang regalia or where messages on student shirts or jackets promoted inappropriate or illegal activities.<sup>25</sup> The dress codes have not been upheld where the dress codes infringes upon a protected right (typically, free speech or exercise of one’s religion).

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<sup>24</sup>See “Dress Codes,” **Quarterly Report**, July-September: 1995. For updates, please refer to the cumulative index.

<sup>25</sup>Dress codes typically proscribe the wearing of certain attire. Uniform codes prescribe the attire to be worn. This article addresses dress codes.

A recent article in *The Indianapolis Star* underscores the increased emphasis on dress codes in public schools.<sup>26</sup> Popular culture and the fashions it spawns may not be suitable for classroom work. “Dress codes typically restrict spaghetti straps, strapless and backless tops and bare midriffs. Tank tops and any headgear—such as hats or bandanas—also are usually prohibited,” according to the article. T-shirts that promote alcohol, drugs, or sex are not permitted. Students are asked either to turn the shirts inside out or the school may have a large white T-shirt that the student wears over the offending T-shirt and its message. Schools have also banned pants and skirts that drag the floor, shirts that are not at least waist length, and any clothing with holes, rips, tears or patches.

The latest published case to address dress codes within the public school context is *Byars et al. v. City of Waterbury*, 795 A.2d 630 (Conn. Super. 2001). In *Byars*, students were suspended or expelled for violating the school’s dress code which, in part, precluded the wearing of blue jeans.<sup>27</sup>

Byars violated the school policy forty-nine times in the last three months of the 1998-1999 school year, for which she was eventually expelled. She was assigned to the alternative school, but her parents elected to home school her for the 1999-2000 school year. The parents eventually sued the school district, asserting the dress code interfered with their right to exercise parental autonomy in violation of the First and Fourteenth Amendments. They made no claims the dress code imposed additional expense upon them, nor did they allege a burden upon freedom of expression in general or political expression in particular. They made no claim based on religious practices or physical disabilities, although the school’s policy did provide for accommodations in these latter respects. The claim was basically one that the parents believed they have the right to dictate what the student can wear to her public school.

The court noted at 637 that the school board articulated reasons for its dress code: There had been frequent disruptive, distracting conduct directly tied to the types of clothing that students were wearing to school in the years immediately preceding the imposition of the dress code policy. Some of the clothing styles and fashions the students were wearing originated in prison settings, causing distractions in the classroom, on the school buses, and during lunch and recess periods. At the middle school, students were “frequently engaged in disputes and taunting regarding each other’s ownership or lack of ownership of designer blue jeans, apparel with prominent Tommy Hilfiger or other favored logos, and expensive sneakers. Teachers with many years of experience testified that much instructional time was lost to adjudicating disputes concerning such items, reporting or investigating thefts of coveted items, and trying to stop those who possessed fashionable items from scoffing at those who did not and who were either dismayed or moved to truculence by invidious comparisons.” *Id.* Expensive clothes and shoes were being stolen during physical education classes.

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<sup>26</sup>“Schools Tighten Dress Codes: Clothing Styles Prompt Educators To Lay Down The Law On Suitable Attire,” *The Indianapolis Star* (Josh Duke, August 13, 2002).

<sup>27</sup>The dress code also prohibited the wearing of gang colors, revealing styles, torn or tattered styles, hooded shirts, and hazardous footwear and jewelry, as well possessing such electronic devices as beepers, cellphones, and laser pointers.

The school board had attempted lesser intrusive means by banning certain items, but this was unavailing. The court found the school board was justified in enacting its school attire policy. The court added at 638-39:

Though enforcement of the school attire policy was not shown to have resulted in measurable improvements in performance on standardized tests or on attendance in the middle schools, teachers reported that they spend less time on fights and taunting based on clothing and that thefts of clothing that comports with the dress code are rare, eliminating the distractions and disruptions caused by the need to investigate and adjudicate bad conduct related to or arising from clothing.

There is “no fundamental right to wear blue jeans to school,” the court noted at 643, especially where, as here, there are no claims that the blue jeans represent anything other than personal preference in clothing styles. Although parental right to direct the education of the parent’s child is “fundamental,” this does not mean such a right is “absolute.” “Recognition of parental autonomy in important decisions concerning the rearing of their children has never been held to entitle parents to suspend all rules imposed by social institutions if those rules are at odds with the parents’ preferences.” 795 A.2d at 645. There is no “parental right to send children to public schools and decide which, if any, of the school’s regulations would apply to their children.” *Id.*

The absolute right of parental autonomy that the plaintiff parents favor is totally unworkable in a multi-cultural community whose members hold a wide variety of beliefs concerning parenting and education. If, as the plaintiff parents assert, parents are constitutionally entitled to have no restrictions whatsoever placed on their children while they attend public schools, or to have their children be subject only to those school rules with which the parents concur, it would be impossible for school districts to prohibit guns in school, require students to attend for a particular number of hours or days, set a school calendar, or require students to study particular core subjects. Absolute exercise of parental autonomy within the public school program would very likely cause total chaos as conflicting parental visions collided. No court has given the concept of parental autonomy the sweep advocated by the plaintiffs.

*Id.* The school’s dress code is rationally related to a legitimate purpose of reducing actual disruptions and loss of instructional time occasioned by students’ preoccupations with current fashionable clothing, including blue jeans. There was no allegation and no showing that the dress code in any way violated a right to freedom of speech or expression. 795 A.2d at 646-47.

On August 26, 2002, the Third Circuit Court of Appeals issued a decision in Scicchitano et al. v. Mt. Carmel Area School Board, 46 Fed. Appx. at 667 (3<sup>rd</sup> Cir. 2002), addressing a peculiar situation where the school started off with a uniform policy—which typically does not involve First Amendment issues—and then ended up with a dress code dispute—which often does involve free

speech disputes.<sup>28</sup> Pennsylvania statute, like Indiana, gives school districts the option to impose dress codes. The school district initially instituted a “dress code” for grades K-6 which limited students to certain solid colors for tops and bottoms (specifically, khaki, dark navy, or black for pants or shorts; red, white, or blue for shirts). Shirts may feature the school slogan. There was a waiver process available in order to accommodate religious beliefs or economic hardship.

Shortly after the dress code was implemented, a student wore a shirt with the following message: “Followers wear uniforms, leaders don’t.” School officials considered the slogan offensive to other students because it demeaned students who complied with the dress code. The student received relatively mild sanctions, but he continued to wear the shirt with its slogan. School officials banned the slogan but inexplicably created a list of approved slogans that students could wear to protest the uniform policy. The following were approved slogans:

- I love MCA [Mt. Carmel Area], I hate school uniforms.
- God gave us the rainbow, Mount Carmel SD [School District] took that away.
- I take the Fifth.
- ...you took away our clothes, what’s next, our crayons?
- A uniform is a terrible thing to wear.
- A uniform is a lousy thing to wear.
- Looking alike is absurd.
- The MCA School Board voted and all I got was this lousy uniform.

The federal district court found in favor of the school district, but the Third Circuit vacated the district court’s determinations and dismissed the action because the named plaintiffs were either not subject to the uniform policy because they were home-schooled children or were never sanctioned for wearing unapproved slogans.

This does not mean that the Third Circuit did not have a dim view of the school district’s attempt to engage in viewpoint censorship when it did not need to do so in the first place. “Although the complaint in this case raises serious questions about the School District’s application of the dress code and its decision to allow the display of some protest slogans but not the ‘Followers’ slogan, we cannot reach the merits of those questions [due to the lack of standing of the plaintiffs to bring this claim].” 46 Fed. Appx. at 671. “[Accordingly,] we cannot reach the interesting issue of whether the School District’s policy violates the standard for regulation of student speech set forth in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)...” 46 Fed. Appx. at 672.

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<sup>28</sup>Decisions reported in the Federal Appendix are not precedential. This case was not selected for publications in the Federal Reporter.

## COURT JESTERS: *THE CAT WITH THE CHAT*

Cats are a mystery to humans, as well as a source of awe and occasional dread. Ancient Egyptians deified them. Romans employed cats as symbols of liberty because no other animal is as adverse to confinement as a cat.<sup>29</sup>

Similes and metaphors abound: cat burglar, cat call, catnap, catwalk.

Curiosity will kill a cat.

Someone let the cat out of the bag.

A cat has nine lives.<sup>30</sup>

But no one has ever said a cat could talk...until a federal district court judge said it was so.<sup>31</sup>

A talking cat was the central actor in a drama played out in Augusta, Georgia. In Miles v. City Council of Augusta, Ga., 551 F.Supp. 349 (S.D. Ga.1982), “Blackie, the Talking Cat” was the...er...talk of the town. His owners, an otherwise unemployed married couple, would walk the streets of the famed city,<sup>32</sup> waiting for someone to ask Blackie to talk. After the performance, the couple would solicit contributions.

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<sup>29</sup>Adlai E. Stevenson, when he was governor of Illinois, issued a famous “Cat Bill Veto” message on April 23, 1949, declining to sign into law an enactment that would require cat owners to maintain their pets on leashes. The intent was to protect the birds. Stevenson observed rhetorically that similar legislation would be necessary to protect birds from birds as well as worms from birds. “In my opinion, the State of Illinois and its local governing bodies already have enough to do without trying to control feline delinquency.” The Papers of Adlai E. Stevenson, Vol. 3, pp. 73-74 (Walter Johnson, ed., 1973).

<sup>30</sup>“One of the striking differences between a cat and a lie is that a cat has only nine lives.” The Tragedy of Pudd’nhead Wilson, Mark Twain (1894).

<sup>31</sup>William Shakespeare did write in *The Tempest*, II, ii: “Come on your ways; open your mouth; here is that which will give language to you, cat; open your mouth.” However, he was not referring to a cat *actually* speaking. He was describing good liquor that would loosen anyone’s tongue.

<sup>32</sup>Golfing enthusiasts are well aware of Augusta’s reputation. More literary-minded people recall Erskine Caldwell’s many references to the southeastern Georgia city in such novels as God’s Little Acre and Tobacco Road. Augusta was also the scene of the fourth—and final—trial of Jim Williams, the Savannah dealer in antiques, social scion, and owner of the fabled Mercer House who was charged with the murder of Danny Huntsford. The somewhat sordid story was made famous by author John Berendt in his nonfiction work, Midnight in the Garden of Good and Evil: A Savannah Story (Random House, 1994), as well as in the subsequent movie release.

The police warned the couple that they needed to obtain a business license, as required by city ordinance. They declined, attacking the ordinance as being unconstitutionally vague because it didn't specifically require such a license for a talking cat.

The lawsuit followed. The matter fell into the lap of Judge Dudley H. Bowen, Jr., the federal district court judge whose federal district court was located in Augusta. Judge Bowen succinctly found that the City of Augusta had the authority to create such an ordinance; it was neither vague nor overly broad; and the couple's First Amendment rights of free speech and association were not affected by the requirement that they obtain a business license before soliciting on city streets. The judge also entered into the record his *ex parte* conversation with Blackie:

[I]t should be disclosed that I have seen and heard a demonstration of Blackie's abilities.... One afternoon while crossing Greene Street in an automobile, I spotted in the median, a man accompanied by a cat and a woman.<sup>33</sup> The black cat was draped over his left shoulder. Knowing the matter to be in litigation, and suspecting the cat was Blackie, I thought twice before stopping. Observing, however, that counsel for neither side was present and that any citizen on the street could have happened by chance upon the scene, I spoke, and the man with the cat eagerly responded to my greeting. I asked him if his cat could talk. He said he could, and if I would pull over on the side street, he would show me. I did, and he did.... Held and stroked by the man[,] Blackie said "I love you" and "I want my Mama." The man then explained that the cat was the sole source of income for him and his wife and requested a donation, which was provided. I felt that my dollar was well spent. The cat was entertaining as was its owner...

551 F.Supp. At 350, *n.* 1. Judge Bowen added that he was disclosing this *ex parte* conversation with Blackie and assuring the parties that his "chance contact" was not considered as evidence when he ruled in favor of the city's Motion for Summary Judgment.

Blackie could speak, but the cat didn't have the judge's tongue. The judge decided, at 351, *n.* 2, to expound upon the curious relationship between cats and humans.

That a talking cat could generate interest and income is not surprising. Man's fascination with the domestic feline is perennial. People of western cultures usually fall into two categories. Generally, they are ailurophiles or ailurophobes. Cats are ubiquitous in the literature, ore and fiber of our society and language. The ruthless Garfield commands the comic strips, the Cat in the Hat exasperates even Dr. Seuss, and who hasn't heard of Heathcliff, Felix or Sylvester? Historically, calico cats have eaten gingham dogs, we are taught that "a cat can look at a king" and at least one cat has "been to London to see the Queen."

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<sup>33</sup>But not Cat Woman. That is an altogether different story.

It is often said that imitation is the sincerest form of flattery. To the animal world, I am sure that the sincerest form is anthropomorphosis. The ailurophobes contend that anthropomorphosis abounds, and that it is the work of ailurophiles. The ailurophiles say that they do not anthropomorphize cats but, rather, that cats have such human qualities as they may condescend to adopt for their own selfish purposes. Perhaps such was the case with Saki's ill-fated Tobermory, the cat who knew too much and told all, who, when asked if the human language had been difficult to learn, "...looked squarely at [Miss Resker] for a moment and then fixed his gaze serenely on the middle distance."<sup>34</sup> It was obvious that boring questions lay outside his scheme of life."

For hundreds, perhaps thousands of years, people have carried on conversations with cats. Most often, these are one-sided and range from cloying, mawkish nonsense to topics of science and the liberal arts. Apparently Blackie's pride does not prevent him from making an occasional response to this great gush of human verbiage, much to the satisfaction and benefit of his "owners." Apparently, some cats do talk. Others just grin.

The owners of Blackie found themselves in the legal equivalent of the dog house, which is better than the cat house. There is an ordinance against that as well.

### QUOTABLE . . .

Common wisdom holds that the most complicated matter in state government is the school funding formula.

Randall T. Shepard, Chief Justice, Indiana Supreme Court, in Indiana Family and Social Services Administration et al. v. Walgreen Co., et al., 769 N.E.2d 158 (Ind. 2002), opining that Medicaid administration is becoming just as complicated if not more so.

### UPDATES

#### *Native American Symbols as Mascots*

There continue to be disputes over the use of certain mascots by public school districts, post-secondary institutions, and professional teams. Objections have been voiced (and litigated) with

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<sup>34</sup>"Saki" is the pseudonym of British writer Hector Hugh Munro.

respect to perceived Satanic influences,<sup>35</sup> the Confederate Battle Flag and references to the Confederacy (usually by schools with “South” or “Southern” in their names),<sup>36</sup> and the use and misuse of Native American symbols as mascots and nicknames.<sup>37</sup> One of the continuing battles in the latter category involve the University of Illinois and its mascot, “Chief Illiniwek,” versus faculty and students who oppose the mascot as contributing to cultural biases and stereotypes. The faculty and students, as plaintiffs, sought the names and addresses of prospective student-athletes so they could contact them regarding the university’s position that Chief Illiniwek would continue to be the school’s mascot. The plaintiffs obtained a temporary restraining order to overcome the university’s reliance upon an NCAA rule as the basis for refusing to provide the names and addresses. The court found in Crue v. Aiken, 137 F.Supp.2d 1076 (C.D. Ill. 2001) that the rule, as applied by the university, constituted an unlawful prior restraint on speech that was not justified by the university’s fear of violating an NCAA rule and being sanctioned for doing so. The dispute over Chief Illiniwek is a matter of public concern, the court wrote, and everyone should have the opportunity to communicate on the topic.

On May 24, 2002, the court, in Crue v. Aiken, 204 F.Supp.2d 1130 (C.D. Ill. 2002), granted the plaintiffs’ Motion for Partial Summary Judgment and denied the university’s Motion for Summary Judgment, finding the university’s “Preclearance Directive,” which sought to discourage contact with student-athletes ostensibly in order to comply with NCAA rules restricting contact, was an unconstitutional prior restraint on speech because it prohibited such contacts without first obtaining the express authorization of the athletic director. Given the timing of this directive (media inquiries regarding the plaintiffs’ announced intentions to begin contacting such prospective student-athletes), the university’s action was a content-based prior restraint on speech, in violation of the First Amendment. The intent was to place a substantial burden on the particular type of expressive activity (the plaintiffs’ complaints concerning the mascot). 204 F.Supp.2d at 1138-39. The court recognized that although the university did have a legitimate interest in complying with NCAA requirements, its Preclearance Directive was not narrowly tailored to achieve such a purpose, providing instead a much more substantial burden on speech that was necessary to further this interest. At 1139. The directive “chilled potential speech instead of punishing speech after it occurred...” *Id.* The university could not delegate its responsibility to safeguard First Amendment rights by blindly relying on an interpretation and extension of NCAA rules as justification for issuing its directive. “Whatever the scope of the harm that could reasonably and legitimately have been perceived at the time, the University could not set out to avoid such harm by abdicating its independent responsibility to determine whether an NCAA rules interpretation is consistent with the

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<sup>35</sup>See “Er the Gobble-Uns’ll Git You,” **Quarterly Report** July-September: 1996, reporting on challenges to the use of “Red Devils” and “Blue Devils” as mascots.

<sup>36</sup>See “Confederate Symbols and School Policies: Mascots and Collective Free Speech,” **Quarterly Report** January-March: 1999.

<sup>37</sup>See “The Growing Controversy Over the Use of Native American Symbols as Mascots, Logos, and Nicknames,” **Quarterly Report** January-March: 2001.



First Amendment rights of its students and faculty and instead delegate that responsibility to the NCAA.” At 1146.

The prior restraint on speech created by the directive lacked sufficient justification. There was not showing that the proposed speech (the contact with the prospective student-athletes regarding the mascot, a topic of public concern) presented a likelihood of imminent lawless action or that the speech would have materially and substantially interfered with the university’s requirements of appropriate discipline in the operation of the university. “To the contrary, all that has been demonstrated is the subjective belief of certain University officials that the proposed speech might subject the University to some sort of sanction by the NCAA or interfere with its efforts to recruit the best student athletes into its program.” At 1149.

Date: \_\_\_\_\_

\_\_\_\_\_  
Kevin C. McDowell, General Counsel  
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The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <[www.doe.state.in.us/legal/](http://www.doe.state.in.us/legal/)>.

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